Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1634

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF REGION 14 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, AND PET, INCORPORATED,
Respondents.

BRIEF OF RESPONDENT PET, INCORPORATED, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement	2
Argument	5
Conclusion	7
Certificate of Service	8

Table of Authorities

Cases:

Bachman Machine Co. v. National Labor Relations Board, 266 F. 2d 599, 605 (C.A. 8 1969)	4
Danielson v. Joint Board of Coat, Suit and Allied Garment Workers Union, 494 F. 2d 1230 (2d Cir. 1974)	5
Drivers, Chauffeurs and Helpers Local 639 (Poole's Warehousing, Inc., 158 NLRB 1281, 1285-1286 (1966)	4
Electrical Workers v. National Labor Relations Board, 341 U.S. 694, 705 (1951)	6
Humphrey v. International Longshoremen's Association, AFL-CIO, 548 F. 2d 494 (4th Cir. 1977)	5
J. G. Roy & Sons Co. v. National Labor Relations Board, 251 F. 2d 771, 773-774 (C.A. 1)	4
Miami Newspaper Printing Pressmen's Local No. 46 v. National Labor Relations Board (Knight Newspapers, Inc.), 322 F. 2d 405, 408-409 (C.A. D.C. 1963)	4

National Labor Relations Board v. Fruit & Vegetable Packers & Warehousemen (Tree Fruits), 377 U.S. 58 (1964) 6
National Labor Relations Board v. Local 825, Operating Engineers, 400 U.S. 297, 302-303 (1971) 6

San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d 541 (9th Cir. 1969) 4

Statutes:

28 U.S.C. § 1254(1) 2

National Labor Relations Act, 29 U.S.C. § 160 .....2, 4, 5, 6

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Respondent PET, INCORPORATED, opposes the issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit. The decision below is correct and consistent with the statutory language and the applicable case law.

JURISDICTION

The opinion and judgment of the court of appeals was entered on February 22, 1979 (Pet. App. 1a-12a).[1] The petition

[1] On March 14, 1979, the court of appeals denied petitioner's request for a stay of mandate. On April 3, 1979, Mr. Justice Blackmun denied a stay of mandate and on April 16, 1979, the application for stay addressed to Mr. Justice Brennan was referred to the Court and denied.

for certiorari was filed April 24, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

The issues presented in the petition for certiorari do not arise on the record below. The questions posed by the petition for certiorari imply that the court of appeals believed that the union's conduct is lawful. This is not so.

STATUTE INVOLVED

The revelant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 160) is set forth at Pet. 3.

STATEMENT

Respondent Pet, Incorporated (hereinafter "Pet") filed a charge with the Regional Director of the National Labor Relations Board alleging that the United Steelworkers of America, AFL-CIO-CLC (hereinafter "Petitioner") was violating Section 8(b)(4) of the National Labor Relations Act (hereinafter "Act"). Upon determining that a complaint should issue on the charge, the Regional Director petitioned the United States District Court for the Eastern District of Missouri, pursuant to Section 10(1) [29 U.S.C. 160(1)] of the Act, for an injunction pending a final decision by the Board (Pet. 4-5). The district court denied injunctive relief and dismissed the petition (Pet. App. 20a).

The Regional Director appealed and the court of appeals reversed the district court because it was "convinced that there

was reasonable cause to believe that a violation of the Act had occurred" (Pet. App. 10a). The court of appeals explained its reversal of the district court as follows:

> "We are concerned with contentions that the Union's appeals for a consumer boycott of Pet's divisions and their products in support of the Union's dispute at the Bridgeton plant unlawfully restrained and coerced Pet and its divisions. We are concerned with the question of whether the boycott was pursued unlawfully for the object of causing Pet's divisions to cease doing business with their customers, suppliers and distributors and to cause their customers, suppliers and distributors to cease doing business with Pet and its divisions. In these areas especially, we are impelled to the conclusion that in holding that the conduct in question did not violate the Act in denying the injunction on the basis of that holding the trial judge exceeded permissible limits of district court inquiry under § 10(a)(1).
>
> Upon the record now before us, we are convinced that there was reasonable cause to believe that a violation of the Act had occurred. Accordingly, the judgment of the district court must be reversed and the cause remanded with directions." (Pet. App. 10a).

There is no dispute between the parties as to the material facts (Pet. 5). The petitioner has no labor dispute with Pet. Petitioner has engaged in a total boycott of all products sold or produced by Pet or any of its divisions. Petitioner's sole dispute is with Hussmann Refrigerator Company (hereinafter "Hussmann") a wholly owned subsidiary of Pet (Pet. App. 2a and 2b). The petitioner's handbills, newspaper advertisements, and other appeals for a total boycott of Pet is in furtherance of its dispute with Hussmann (Pet. App. 2a). Under the Act, Pet

and its divisions other than Hussmann are neutral, unoffending employers, and are not parties to the Hussmann labor dispute.[2]

[2] The "Board and the courts have consistently and repeatedly held that common ownership alone does not suffice [to remove the protective shield of Section 8(b)(4)(B)]. There must be something more in the form of common control, as it is usually phrased, denoting an actual, as distinct from merely a potential, integration of operations and management policies. Two business enterprises, although commonly owned, do not for that reason alone become so allied wtih each other as to lift the congressional ban upon the extension of labor strife from the one to the other." *Miami Newspaper Printing Pressmen's Local No. 46 v. National Labor Relations Board (Knight Newspapers, Inc.)*, 322 F. 2d 405, 408-409 (C.A. D.C. 1963) Accord: *San Francisco-Oakland Newspaper Guild v. Kennedy*, 412 F. 2d 541 (9th Cir. 1969); *J. G. Roy & Sons Co. v. National Labor Relations Board*, 251 F. 2d 771, 773-774 (C.A. 1); *Bachman Machine Co. v. National Labor Relations Board*, 266 F. 2d 599, 605 (C.A. 8 1969); *Drivers, Chauffeurs and Helpers Local 639 (Poole's Warehousing, Inc.*, 158 NLRB 1281, 1285-1286 (1966)).

ARGUMENT

The unanimous decision of the court of appeals is correct. That decision is consistent with the statutory language and the decisions of other courts of appeal. Pet respectfully submits that no issue warranting further review is presented.

1. Contrary to petitioner's contention the record in this case does not present the question as to whether a 10(1) injunction should issue "against conduct which the court believes is lawful." The court of appeals in the instant case expressly stated that "we are convinced that there was reasonable cause to believe that a violation of the Act had occurred" (Pet. App. 10a). Petitioner cites no case in which any court of appeals has sustained the denial of a 10(1) injunction under such circumstances.

The two court of appeals decisions upon which petitioner relies are not in conflict with the decision of the court of appeals in the instant case. Indeed, in *Humphrey v. International Longshoremen's Association, AFL-CIO*, 548 F. 2d 494 (4th Cir. 1977) the majority of the court held that the district court erred in refusing to issue the 10(1) injunction because "we conclude that appellant [Regional Director] has ample reasonable cause to believe that appellees are violating the Act."

The other decision relied upon by petitioner, *Danielson v. Joint Board of Coat, Suit and Allied Garment Workers Union*, 494 F. 2d 1230 (2d Cir. 1974), is not in conflict with the decision of the court of appeals in the instant case. In the *Danielson* case, the court of appeals held that a district court should not issue an injunction if it is convinced that the General Counsel's legal position is wrong. Manifestly, that decision has no relevance and is not inconsistent with decision of the court of appeals in the instant case.

Courts of appeal may utilize different phraseology from time to time to rationalize their conclusion in a particular case that the statutory requirement of reasonable cause has *not* been satisfied. Such cases are totally irrelevant to the instant case since the court of appeals had no doubt that the Regional Director was correct in his belief that the Act was being violated.

2. Nor is there substance to petitioner's further contention that its appeals for a total boycott of all Pet products are protected by the First Amendment and/or the publicity proviso to Section 8(b)(4) of the Act (Pet. 14-17). Section 8(b)(4) of the Act prohibits the enmeshing of neutral employers in disputes not their own, where an object is to force the cessation of business between the neutral employer and any other person. *National Labor Relations Board v. Local 825, Operating Engineers*, 400 U.S. 297, 302-303 (1971). This Court has rejected union attacks upon the constitutionality of the secondary boycott provisions of the Act. "The prohibition of inducement or encouragement of secondary pressure by § 8(b) 4)(A) [now § 8(b)(4)(B)] carries no unconstitutional abridgement of free speech." *Electrical Workers v. National Labor Relations Board*, 341 U.S. 694, 705 (1951). First amendment considerations guided this Court in its interpretation of the publicity proviso to Section 8(b)(4) of the Act in *National Labor Relations Board v. Fruit & Vegetable Packers & Warehousemen (Tree Fruits)*, 377 U.S. 58 (1964). While a union's right to inform the public that a store is selling a struck product may be constitutionally protected, a union's appeal to stop all trading with the secondary employer is not protected by the first amendment. Neither the Constitution nor the proviso to 8(b)(4) grants the petitioner the right to appeal for a total boycott of products produced by employers with whom the petitioner has no dispute.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated. June 12, 1979

Certificate of Service

I hereby certify that copies of Brief of Respondent Pet, Incorporated in opposition to the petition for writ of certiorari were served upon each of the following by first class mail at the addresses listed below:

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